

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

BRIAN GLENN COX,

Petitioner,

V.

JASON BENNETT,

Respondent.

Case No. 3:23-cv-05036-TMC-TLF

ORDER ON REPORT AND RECOMMENDATION

The Court, having reviewed the Report and Recommendation of Judge Theresa L. Fricke, United States Magistrate Judge, Petitioner Brian Cox's objections to the Report and Recommendation, and the remaining record, does hereby find and ORDER:

1. The Court adopts the Report and Recommendation except for the recommendation to deny a certificate of appealability.

a. The Court has conducted de novo review of the Report and Recommendation based on Petitioner Cox's objections. Fed. R. Civ. P. 72(b); *United States v.*

b. Cox first objects that the Magistrate Judge incorrectly determined that the habeas petition is barred by the statute of limitations. Dkt. 38 at 1–8. After

1 conducting de novo review, the Court agrees with and adopts the Magistrate
2 Judge's analysis. The U.S. Supreme Court has "repeatedly held that a state
3 court's interpretation of state law, including one announced on direct appeal
4 of the challenged conviction, binds a federal court sitting in habeas corpus."
5 *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005). The Washington Court of
6 Appeals determined as a matter of state law that Cox's time for seeking direct
7 review by the Washington Supreme Court expired on December 9, 2016.
8 Dkt. 13-1 at 225.

- 9 c. Cox also objects to the Magistrate Judge's conclusion that his claim is not
10 subject to equitable tolling. After conducting de novo review, the Court agrees
11 with and adopts the Magistrate Judge's conclusion. Even if the discovery of
12 new emails relevant to Cox's *Brady* claim in August 2017 amounts to an
13 extraordinary circumstance, Cox has not shown that he acted with reasonable
14 diligence and that this extraordinary circumstance prevented him from making
15 a timely filing after learning of the emails' existence. *Smith v. Davis*, 953 F.3d
16 582, 589 (9th Cir. 2020) (en banc).
- 17 d. Finally, Cox objects to the Magistrate Judge's recommendation that a
18 certificate of appealability be denied. Because the Court finds that reasonable
19 jurists could disagree with its conclusions or conclude the issues presented are
20 adequate to receive further review, the Court declines to adopt that portion of
21 the Report and Recommendation and will grant a certificate of appealability.

22 2. Petitioner's habeas corpus petition is DENIED with prejudice.

23 3. The Court GRANTS a certificate of appealability as to whether Cox's petition was
24 timely filed and whether Cox was entitled to equitable tolling.

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2 Dated this 1st day of November, 2024.
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Tiffany M. Cartwright
United States District Judge